(A)

No. 88-49

In The
Supreme Court of the United States
October Term, 1988

_____O_____

CALVIN BERRY, III, et. al.,

Petitioner

vs.

THE CITY OF DALLAS, et. al.,

Respondent

_____O_____

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____O_____

BRIEF FOR PETITIONER

_____O_____

Frank P. Hernandez
5999 Summerside, Suite 101
Dallas, Texas 75252
(214)931-9444
(Counsel of Record)

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QUESTIONS PRESENTED

1. WHETHER CITY OF DALLAS ORDINANCE NO. 19196, SECTIONS 41, A-2(4), (A),(B), (C); SECTION 41 A-2(19); SECTION 41 A-3 (1) THROUGH (9); AND SECTION 41 A-18 (a), (b), (c) ARE UNCONSTITUTIONAL AND VIOLATE THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. WHETHER CITY OF DALLAS ORDINANCE NO. 19196 IS UNCONSTITUTIONAL AS AN INFRINGEMENT ON AN INDIVIDUAL'S RIGHT TO FREEDOM OF ASSOCIATION.

PARTIES

CALVIN BERRY, III, PETITIONER-PLAINTIFF

SANJAY THAKOR, PETITIONER-PLAINTIFF

RUDOLFF FERNANDEZ, PETITIONER-PLAINTIFF

DALLAS MOTEL ASSOCIATION, PETITIONER-PLAINTIFF

CITY OF DALLAS, TEXAS, RESPONDENT-DEFENDANT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on February 12, 1988 affirming the judgment of the District Court. *FW/PBS, Inc., vs. City of Dallas*, 837 F.2d. 1298 (5th. Cir. 1988). The judgment of the District Court was issued on September 12, 1986 granting Respondent's Motion For Summary Judgment. *Dumas vs. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). The Petition for a Writ of Certiorari was filed on June 13, 1988. The petition was granted on February 27, 1989.

JURISDICTIONAL STATEMENT

The judgment of the the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. The jursidicition of this Court is in-

voked under 28 U.S.C. Sec. 1254 (1), and 28 U.S.C. Sec. 2101 (c), and under 28 U.S.C. 2103.

APPLICABLE CONSTITUTIONAL PROVISIONS.

UNITED STATES CONSTITUTION, Amendment I

Congress shall make no law...abridging the freedom of speech,...or the right of the people peaceably to assemble....[1]

UNITED STATES CONSTITUTION, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,....

UNITED STATES CONSTITUTION, Amendment V.

No person shall...be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amendment XIV.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DALLAS REVISED MUNICIPAL CODE, Chap. 41 *et. seq.*, enacted June 18, 1986 together with amendments to chapter 41 enacted on October 12, 1986. Specifically,

SECTION 41, A-2. Definitions.

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accomodations to the public for any form of consideration; provides patrons with closed circuit television transmissions,

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[1] The State of Texas has similar provision. Texas Constitution, Article 1 - 8, Freedom of speech and press, provides that "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(19) SEXUALLY ORIENTED BUSINESS means ..an adult motel....

SECTION 41A-3 CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(4) adult motels;

SECTION 41A-18 ADDITIONAL REGULATIONS FOR ADULT MOTELS

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SECTION 41A-7 INSPECTION

(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a

permanent or temporary habitation.

STATEMENT OF CASE

Petitioners are owners and operators of motels located in the City of Dallas, Texas. Petitioners rent their motel rooms out to the general public for various periods of time, the shortest time being two hours. Petitioners provide patrons with television transmissions, public circuit television transmission and video cassettes. Petitioners' motels do not have a sign visible from the public right-of-way which advertises the availability of this photographic reproduction. Petitioners rent motel rooms to individuals: individuals of the same sex, individuals of the opposite sex, individuals who are married, individuals who married with families, individuals who are unmarried, individuals who are unmarried with families. In short, Petitioners rent motel rooms to the general public in a competitive free market atmosphere, charging competitive market prices for the use of their facilities.

On June 18, 1986, the City of Dallas, Texas, acting through its City Council, amended the Dallas City Code, Chapter 41 by enacting Ordinance 19196. Chapter 41A is defined as Sexually Oriented Businesses.

Petitioners filed their Original Complaint as a civil action in the Northern District of Texas seeking a Temporary Restraining Order and a Permanent Injunction against the City of Dallas, requesting that the City of Dallas be enjoined from enforcing the provisions of Ordinance 19196.

Petitioners challenged Ordinance 19196 as being unconstitutional and violative of the First, Fourth, Eighth, Ninth,and Fourteenth Amendments to the United States Constitution. Petitioners challenged Ordinance 19196 as being violative of the Equal Protection Clause of the United States Constitution.

Since, *FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al*, had been filed prior to Petitioners filing their Original Complaint, the Court, by Order on August 4, 1986, consolidated all of the challenges to City of Dallas Ordinance 19196 and, by Order of August 6, 1986, set an accelerated schedule for oral argument on all Motions For Summary Judgment For Oral Presentation in September and, on September 12, 1986, the District Court filed its Memorandum Opinion granting Respondent's Motion For Summary Judgment.

Respondents appealed to the Fifth Circuit Court of Appeals and that portion relating to adult motels was affirmed. *FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al*, 837F.2d 1298 (5th Cir. 1988).

It is Petitioners' position that neither the District Court nor the United States Court of Appeals for the Fifth Circuit has addressed the adult motel issue meaningfully. The District Court referred to the adult motel issue only in the following instances:

FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al, where the Court stated:

> Five members of the 15-member Commission and four of the 11 members of the council stated unequivocally—to no dissent—that the Ordinance was concerned solely with controlling the secondary effects of sexually-oriented businesses on surrounding neighborhoods. (Footnotes omitted)

Dumas vs. City of Dallas, 648 F.Supp. 1061, 1066-67 (N.D. Tex.1986), where the Court stated:

> The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the ordinance: (1) adult arcades; (2)adult bookstores or adult video stores; (3) adult cabarets; (4)*adult motels*; (5)adult motion picture theaters; (6)adult theaters; and (7)nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the ordinance. (Footnote omitted, emphasis added)
>
> Adult motels, for example, will be restricted to renting rooms for at least 10 hours rather than the two-hour period, now—thus cutting income by up to 80 percent

Dumas vs. City of Dallas, 648 F.Supp. 1061, 1076 (N.D. Tex.1986), where the Court stated:

> The City did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n. 9 (statement of Ms. Ragsdale),compare df., *Patel and Patel vs. South San Francisco*, 606 F. Supp. 661, 671 (N.D. Cal 1985)(no findings); moreover, recent pronouncements of state power to regulate morality and private consensual activity are probably broad enough to encompass regulations on adult motels. See *Bowers v. Hardwich*, __U.S.__, 106 S.Ct.2841, 92L.Ed. 2d 140 (1986) (no privacy right to consensual homosexual, and, heterosexual sodomy); *Baker vs. Wade*, 769 F.2d 289 (5th Cir. 1985)(en banc), *Cert.*

Denied, __U.S.__, 106 S.Ct. 3338, 92L.Ed.2d 742 (1986) (Footnote omitted.)

The United States Court of Appeals for the Fifth Circuit had one paragraph that relates to Petitioners, when it stated in *FW/PBS, Inc., vs. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) as follows:

> [4] The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

These are the only references to adult motels by the District Court and the Fifth Circuit Court of Appeals.

The "sufficient findings to justify the restrictions on adult motels" cited by the District Court are contained in Respondent's Exhibit 17 (Defendant's Exhibit DX17), which was a Dallas City Council meeting on June 18, 1986. The only finding, testimony, or any reference to adult motels was by City Councilwoman Ms. Ragsdale, who stated, in part, as follows:

> This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given—of these given facilities within the area....It will do the following for those who have come to speak regarding the motels and most of those individuals who did come down regarding Cedar—regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels—motel rooms would not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught—during the interim, if they are caught violating the law, of course,

then their license can be revoked.[2]

This statement by Councilwoman Ragsdale is the only direct evidence as to the effect of adult motels in Dallas, Texas. Respondents introduced at the trial a "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" (Defendants' Exhibit DX11), which Respondents claim the Dallas City Council considered prior to enacting the Ordinance (Respondents' Brief In Opposition, Pg. 4). However, a reading of the Los Angeles City Planning Department Study of June, 1977, clearly demonstrates that, although the study mentions motels, it makes no attempt to explore the subject of "adult motels" meaningfully nor in depth.

On February 12, 1988, the Fifth Circuit affirmed the District Court's Opinion. *FW/PBS, Inc., et.al. vs. the City of Dallas, Texas, et.al.*,837 F.2d.1298 (5th Cir. 1988). On June 13, 1988 Petitioners filed their Petition For Certiorari in this case and it was granted on February 27, 1989, bringing the case before the Court.

SUMMARY OF ARGUMENT

The central issue in this case is whether a city may regulate a business on the basis that a city's interest is self-evident and substantial. The answer is no.

There were no findings by the City of Dallas which identified the adverse impact that renting a motel room for less than ten hours has on a community. The requirements of the case of *City of Renton* have not been met and a ten year old study by the City of Los Angeles is not credible supporting evidence for the Ordinance.

The City of Dallas made no specific findings of the impact by the motel owners' actions on health, safety, welfare, unlawful sexual activities, sexual liaisons of a casual nature or sexually transmitted diseases.

The State power to regulate morality does not extend to the regulation of adult motels.

The record in this case is insufficient to meet the *O'Brien* and *City of Renton* tests. The Ordinance discriminates on its face against speech-based content. The Ordinance is not precisely drawn to pass constitutional muster.

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[2] Appendix C, Petitioner's Petition For Writ Of Certiorari filed June 13, 1988

Even if the Ordinance is treated as a content-neutral time, place and manner restriction, it is still unconstitutional. The First Amendment guarantees are applicable to the Ordinance because the actions of Petitioners and their clientele are protected under the "intimate association" and "expressive association" constitutional protections.

The real party in interest is the City of Dallas. The right of privacy as set forth by this Court in previous cases mandates that the Ordinance be declared unconstitutional. The Ordinance is not a morally-neutral exercise of the City's power to protect the public environment. It is a law designed to enforce private morality and such interference makes the Ordinance unconstitutional.

ARGUMENT

The central issue in this case, as it pertains to the motel owners and operators, is whether a city may regulate a business on the basis that the city's interest is self-evident and substantial.

The Ordinance focuses on the secondary effects of sexually oriented businesses, and there is no doubt that its terms have an incidental impact on expression as protected by the First Amendment. With regard to motels, the Ordinance focuses on the secondary effects of the motel rental practice of renting a motel room for a period as short as two hours. Because of its First Amendment impact, the Ordinance must be analyzed under the four part test of *United States vs. O'Brien* , 391 U.S.367, 377, 88 S.Ct. 1673, 1679, 20 L.ed. 2d. 672 (1968). Under *O'Brien* , regulation is justified, regardless of its impact on First Amendment interests,"[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on...First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S.377, 88 S.Ct. at 1679. Incidental burden on free expression may be analyzed under this test as time, place, and manner regulations. *City of Renton, vs. Playtime Theatres, Inc.*, 475U.S. 41, 106 S.Ct.925, 89 L.Ed.2d.29 (1986). However, "[A] constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. vs. Public Service Comm'n of N.Y.*, 447 U.S. 530, 536, 110 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

NO FINDINGS BY THE CITY THAT LESS THAN TEN HOUR RENTAL PERIOD HAS ANY ADVERSE IMPACT

The Ordinance enacted by the City incorporated the finding that it had authority to regulate businesses pursuant to its police power and that licensing

was a reasonable means to ensure that subject businesses complied with the regulations. See Ordinance (Defendants' Exhibit DX16) at 2. The council found that a substantial number of sexually oriented businesses require regulations to protect the health, safety and welfare of the establishments' patrons and of citizens in general. The City further found that safety authorities should regulate such businesses because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." See Ordinance (Defendants' Exhibit DX 16) at 2. The council found that arrests for sex-related crimes near sexually oriented businesses had been substantial and that there was convincing evidence that sexually oriented businesses were associated with falling property values of surrounding business and residential areas. Additionally, the council found that when such businesses are located near one another, urban blight and a decrease in the quality of life results. Finally, the council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. See Ordinance (Defendants' Exhibit DX16) at 5.

This Court has held that a city does not have to conduct its own studies before enacting an Ordinance, stating:

> The First Amendment does not require a city, before enacting such an Ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addressess. *City of Renton vs. Playtime Theatres, Inc.*, 475 U.S.41, 106 S.Ct. 425, 89 L.Ed.2d,.40 (1986).

Petitioners contend that the City did not meet this burden when it relied on a ten-year old study by the Los Angeles City Planning Department conducted in June, 1977, a study that did not specifically explore the impact of adult motels as this may relate to the purposes and intent of the Dallas Ordinance. The only other evidence is the statement by Councilwoman Ragsdale. See Ordinance (Defendants' Exhibit DX17). Petitioners contend that this evidence falls short of meeting the requirement that the City rely on relevant evidence prior to enacting such an Ordinance.

Specifically, there was no finding by the City that renting motels for less than ten hours had any impact on the health, safety and welfare of the establishments' patrons and citizens in general.

Specifically, there was no finding that the renting of a motel room for less than ten hours contributed to the use of the motel room for unlawful sexual activities, including prostitution.

Specifically, there were no findings that the rental of the motel room for less than ten hours had any adverse impact on the health, safety and welfare of the establishments' patrons and citizens in general or contributed to "sexual liaisons" of a casual nature.

Specifically, there were no findings by the City that the rental of a motel room for less than ten hours had contributed to the spread of sexually transmitted disease.

Since the Ordinance does not regulate consensual activity once customers have rented the room, its regulation of the length of time for which a motel room may be rented is at best irrelevant to the City's expressed concern over sexually transmitted disease and of sexual liaisons of a casual nature.

The Ordinance does not prohibit motels from renting a room by the hour. See Ordinance 41A-18(B). It defines those motels which rent rooms for increments of less than ten hours as "adult motels" and declares that a person commits an "offense" if that person does not have a license to operate a sexually oriented business and rents or subrents a motel room from within ten hours from the time the room is rented, he rents or subrents the same room again. This provision makes the defined "adult motel" then subject to the same type of locational restrictions as those contained in *Young vs. American Mini Theatres, Inc.* and *City of Renton.* Although the City found that these motels required regulation to protect the health, safety and welfare of the establishments' patrons and the general citizenry, this time, place or manner restriction is simply based on a perception of content or activities that occur in the motel rooms rather than on tangible evidence; thus it violates the Constitution. *Consolidated Edison Co. vs. Public Service Comm'n of N.Y.*, 447 U.S., 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d.319(1980).

DOES STATE POWER TO REGULATE MORALITY EXTEND TO ENCOMPASS REGULATION OF ADULT MOTELS

The District Court relied on *Bowers vs. Hardwick* and *Baker vs. Wade* to conclude that

> "...recent pronouncements of state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulation of adult motels."

The Fifth Circuit, realizing that the record was not sufficient to meet the *O'Brien* and *City of Renton* tests found:

"...the City's interests to be self-evident and substantial."

In fact, without support from the record, the Fifth Circuit concluded that:

> "It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the city council was most concerned."

With regard to adult motels, the Ordinance discriminates on its face against certain forms of speech-based content. Motels which rent rooms for less than ten-hour increments are classified and defined as adult motels and may not be located within 1000 feet of any residential zone, single or multiple family dwellings, church, park, or school. Other hotels and motels that do not rent rooms for less than ten hours are not classified and defined as adult motels. This selective treatment strongly suggests that the City of Dallas was interested not in controlling the "secondary effects" associated with adult motels, but in discriminating against adult motels solely on the *perceptions* of what occurs in a given motel room within a two-hour period In this regard, the Statute is infirm because:

> "[A] above all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Police Department of Chicago vs. Mosley*, 408 U.S.92,95 ; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975)."

That some residents may be offended by what occurs in motel rooms, whether they be rented for a period of two hours, ten hours, or longer periods , cannot form the basis for State regulation of speech. See *Terminiello vs. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Some of the findings by the City Council clearly relate to the secondary effects associated with what are described as sexually oriented businesses. They do not relate to supposed secondary effects "associated with adult motels." Nevertheless, this Court should not merely accept these statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Shad vs. Mount Ephraim*, 452 U.S. 61, 77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671 (1981) (BLACKMUN, J., concurring). The City Council conducted no studies and heard no expert testimony on how the protected uses would be affected by the presence of adult motels, and never considered whether residents' concerns could be met by "restrictions that are less intrusive on protected forms of expression." *Schad, supra*, 452 U.S., at

74, 101 S.Ct. at 2186. As a result, any "findings" regarding "secondary effects" caused by adult motels or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens the Ordinance imposes upon constitutionally protected expression.

This Court requires that the Ordinance, like any other content-based restriction on free expression, is constitutional "only if [the City] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S., at 540, 100 S.Ct., at 2334; see also *Carey vs. Brown*, 447 U.S. 455, 461-462, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); *Police Department of Chicago vs. Mosley*, 408 U.S. 92,99, 92 S. Ct. 2286, 2292, 33 L.Ed.2d 212 (1972). Only this strict approach can ensure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression. The City of Dallas has not shown that locating adult motels in proximity to its churches, schools, parks, and residences will result in undesirable "secondary effects" or that these problems could not be effectively addressed by less intrusive restrictions.

Even assuming that the Ordinance should be treated as a content-neutral time, place, and manner restriction, as the District Court assumed, the Ordinance is still unconstitutional. "[R]estrictions of this kind are valid provided...that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark vs. Community for Creative Non-Violence*. 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron vs. International Society for Krishna Consciousness, Inc.* 452 U.S. 640, 648, 101 S.Ct. 2559, 2564 69 L.Ed.2d 298 (1981). In applying this standard, this Court must subject the alleged interests of the City to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations. See *Community for Creative Non-Violence*, 468 U.S., at 301, 104 S.Ct. at 3073 (MARSHALL, J., dissenting).

The District Court and the Appellate Court found that the Ordinance was designed to further City of Dallas' substantial interests in preserving the quality of urban life; or conversely, in diminishing urban blight. As it relates to the described adult motels, the record here is simply insufficient to support this conclusion. The City made no showing as to how uses protected by the Ordinance would be affected by the presence of adult motels. Therefore, this City of Dallas Ordinance, as it affects adult motels, is clearly distinguishable from the Detroit Zoning Ordinance upheld in *Young vs. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The Detroit Ordinance, which was designed to disperse adult theaters throughout the city, was sup-

ported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood Id. at 55, 96 S.Ct., at 2445; See also *Northend Cinema, Inc., vs. Seattle, 90 Wash.*2d.709, 711, 585 P.2d 1153, 1154-1155 (1978), cert. denied, *sub. nom. Apple Theatre, Inc. v. Seattle,* 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979). The Seattle zoning ordinance was the "culmination of a long period of study and discussion." Here, as has been substantiated above, the Dallas City Council was aware only that some residents had complained about adult motels, and that a ten-year old study by the City of Los Angeles had considered cursorily the effect of adult motels. These are not "facts" sufficient to justify the burdens the Ordinance imposes upon constitutionally protected expression of the motel owners and operators and their clientele.

THE RIGHT TO BE LET ALONE

While the First Amendment does not explicityly protect "a right of association," this Court has recognized that it embraces such a right in certain circumstances. In *Roberts vs. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244 82 L.Ed.2d 462 (1984), this Court noted two different sorts of "freedom of association" that are protected by the United States Constitution. "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, the freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*, at 617-618, 104 S.Ct., at 3249.

It is clear that motel patrons are engaged in the sort of intimate human relationships referred to in *Roberts vs. United States Jaycees , supra.* This Ordinance limits the motel owner's ability to rent his motel room for a period of less than ten hours and it limits the opportunity of adults to rent a motel room for as short a time of time as two hours. Although there is scant evidence in the record as to what activities occur in Petitioner's motel rooms, it clearly can be determined that activities protected by the First Amendment are being restricted by the Ordinance because the Petitioner's motel rooms have, at the very least, public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Petitioners do not concede that any of the activities that occur in their motel rooms are unlawful. Petitioners do contend that the associational "activities" of their patrons do involve

the sort of expressive association that the First Amendment has been held to protect. The activity of the motel owners qualifies as a form of "intimate association" and as a form of "expressive association" as those terms were described in *Roberts vs. United States Jaycees , supra.*[3] The City of Dallas concedes that the Ordinance "does not regulate consenual activity within motels." (Respondents' Brief In Opposition, pg. 5) and that the Ordinance "does not prohibit motels from renting rooms by the hour." (Respondents' Brief In Opposition, pg. 6).

This case is no more about regulating adult motels as sexually oriented businesses than *Stanley vs. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), was about a fundamental right to watch obscene movies or *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d, 576 (1967) was about a fundamental right to place interstate bets on the telephone. Rather, this case is about "the most comprehensive of rights and the right most valued by the civilized men": namely, "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (BRANDEIS, J., dissenting). The Ordinance at issue attempts to prevent a commercial business from exercising its admitted First Amendment rights. The Respondent concedes that the Ordinance does not regulate once the patron is in the motel room, but attempts to classify the motel owner as an "adult motel" owner, thereby stigmatizing the motel and its activities and unnecessarily restricting its location and requiring it to comply with all of the other licensing requirements of the Ordinance.

The Ordinance and the Respondent's claims must be analyzed in light of the values that underlie the constitutional right to privacy of the motel owners , and the commercial free speech aspects of the Ordinance as applied to the motel owners and operators.

If the right to be let alone means anything, it means that before the City of Dallas can prosecute its citizens who own motels because other citizens who make choices about the most intimate aspects of their lives, choose to do so in Petitioner's motel rooms, it must do more than assert that the choice they have made is based upon an arbitrary length of time that one citizen has chosen to rent a motel to another citizen.

This Court has long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. *Thornburgh* v. *American Coll. of Obst. & Gyn.*, __U.S.__,106 S. CT. 2169, 2184, 90 L.Ed.2d__(1986). In construing the right of privacy, this

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3 Since the protective right qualifies as "intimate association" and as " expressive association, "the rational-basis scrutiny discussed by the Court in *City of Dallas, et.al., vs. Stanglin*, U.S., S.Ct., L.Ed.2d, (1989) [decided April 3, 1989, no. 87-1848] is not applicable to the Sexually Oriented business Ordinance. The Court stated:

We think respondent's arguments misapprehend the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. In *Dandridge v. Williams*, 397 U.S. 471,

Court has proceeded along two somewhat distinct, albeit, complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. *Roe vs. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Pierce vs. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. *United States vs. Karo*, 468 U.S. 705, 104 S.Ct, 3296, 82 L.Ed.2d 530 (1984); *Payton vs. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Rios vs. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960).

The impact of the Ordinance in this case implicates both the *decisional* and the *spatial aspects* of the right to privacy as it reaches not only the motel owner and operator, but the clientele of the establishment.

The real party in interest is the City of Dallas, for it is the facial constitutionality of a City of Dallas Ordinance that is at issue. In public law cases in which statutory or constitutional violations are asserted, the standing for the real party in interest is present when "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service vs. Camp.*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed. 2d 184 (1970)

The behavior for which the motel owners and operators face prosecution occurs within the sphere of their commercial free speech protection and their clientele's temporary home, a place to which the Fourth Amendment attaches special significance. The District Court and the Appellate Court's treatment of the adult motel aspect of the Ordinance is symptomatic of their overall refusal to consider the broad principles that have informed this Court's treatment of privacy in specific cases. The right to privacy is more than the aggregation of a number of entitlements to engage in specific behavior. Protecting the integrity of the temporary home— i.e., the motel room rented for a specific allotment of time— is more than merely a means of protecting specific activities that often take place there. In this case, the Ordinance does not challenge the specific activities that may take place there. Even when the right to privacy depends on "reference to a 'place'," *Katz vs. United States*, 389, U.S.at 361, 88 S.Ct. at 516 (HARLAN, J, concurring),

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90 S. Ct. 1153, L.Ed.2d 491 (1970), in rejecting the claim that Maryland welfare legislation violated the Equal Protection Clause, the Court said:

> "[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because in practice it results in some inequality.' Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 [31 S. Ct. 337, 340, 55 L.Ed. 369 (1911)]. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations--illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 [33S.Ct. 441, 443, 57 L.Ed. 730 (1913)] ...[The rational-basis standard] 'is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.' Id.,m 397 U.S., at 485-486, 90 S.Ct., at 1162.

"the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California v. Ciraolo*, __U.S__, 106 S.Ct. 1809, 1819, 90 L.Ed.2d 210 (1986) (POWELL, J., dissenting), quoting *Boyd vs. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

The motel owners and operators are asserting their right to be let alone. The impact of the Ordinance in this case is similar to the statute struck down in the holding of *Stanley vs. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). *Stanley* held that the State of Georgia's undoubted power to punish the public distribution of constitutionally, unprotected obscene material did not permit the State to punish the private possession of such material. The *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home. The *Stanley* Court stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

The Court continued:

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.*Stanley vs. Georgia*, 394 U.S. 557, at 564-565, 89 S.Ct., 1243, at 1248, quoting *Olmstead vs. United States*, 277 U.S., at 478, 48 S.Ct., at 572 22 L.Ed.2d 542 (BRANDEIS, J. dissenting): (1969).

It is clear that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Petitioners argue that the Fourth Amendment expressly guarantees the right of the people to be secure in their houses and that such guarantee is the most "textual" of the various constitutional provisions that form our understanding of the right to privacy. Petitioners argue that the right of an individual to conduct intimate relationships in the intimacy of his or her own home, or in his or her own motel room, rented for any length of time, is the center of the Constitution's protection of privacy for its citizens, whether they be clients of motels or motel owners. In fact, the Ordinance does not apply to an area of an adult motel if that area is rented by a client of the motel for use as a permanent habitation (his home) or a temporary habitation (his temporary home). SECTION 41 A-7 (c), (Joint Appendix, page 21).

Petitioners argue that they have the right to be let alone because of their right to commerical free speech as this right affects them directly, and indirectly, as it effects their clientele. It is clear that the Ordinance is attempting to subject motel owners to punishment if they exercise their right to rent their motel rooms for any period less than ten hours. It is equally clear that this punishment is imposed not because of any *evidence* that such rental periods have a harmful effect upon people or property, but because of a purely speculative *perception* of the nature of the purely private activities ocurring during the rental periods. There simply are no facts, as that term is generally understood, to support the Ordinance.

It may be argued, although not proved, that the motel owners by renting the motel space for less than ten hours make uncomfortable a certain group, that is, surrounding areas. This Court has held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty". *O'Connor vs. Donaldson*, 422 U.S. 563, 575, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396 (1975). See also *City of Cleburne vs. Cleburne Living Center*, __U.S.__,105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *U.S. Dept. of Agriculture vs. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973).

The Ordinance here cannot be justified as a morally neutral exercise of the City of Dallas' power to protect the public environment, *Paris Adult Theatre I*, 413 U.S., at 68-69, 93 S.Ct., at 2641. No doubt, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H.L.A. Hart, *Immorality and Treason*, reprinted in *The Law as Literature* 220, 225 (L. Blom-Cooper ed. 1961). The District Court and the Appellate Court failed to see the difference between laws that protect public sensibilities and those that enforce private morality. Furthermore, they did so on even less than a "very thin" basis. *City of Renton*, 748 F2d., at 536. This Court must remember that a Federal Court of Appeals takes no evidence, creates no record, and decides no factual issues in the first instance. A Federal Court of Appeals is a Review Court.

As Justice Blackmun stated in his Dissenting Opinion in *Bowers vs. Hardwick*, __U.S.__,__, 106 S.Ct. 2841, 2855 __L.Ed. 2d __,__, (1986):

> "Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be

punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places." See *Paris Adult Theatre I, supra*, at 66 n. 13 ("marital intercourse on a street corner or a theater stage " can be forbidden despite the constitutional protection identified in *Griswold vs. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).

The Ordinance in this case involves real interference with the rights of the motel owners and the rights of the motels owners' clientele, and the mere knowledge that other individuals in the area allegedly affected by the location of the motel do not adhere to one's own value system cannot be a legally cognizable interest, let alone an interest that can justify invading "the houses, hearts and minds of citizens who choose to live their lives differently." Id.__U.S.__at __, 106 S.Ct. at 2856, __L.Ed.2d (1986). Because the City of Dallas Ordinance expresses the traditional view that what occurs in a motel room is an immoral kind of conduct regardless of the identity of the persons who engage the room and the activity therein, a proper analysis of this constitutionality requires consideration of additional questions: First, may a city totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? Second, may a city save the Ordinance by announcing that it is not regulating consenual activity by adults within motels and is not prohibiting motels from renting rooms by the hour? Third, may the city save the Ordinance by announcing that it is not prohibiting from renting rooms by the hour, but is simply defining those motels which do business as "adult motels" and thereby focusing on the secondary effects of sexual activities that occur between or among private citizens in the motel room?

This Court's prior cases make it abundantly clear that the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. *Loving vs. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Individual decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment *Griswold vs. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 145 L.Ed. 2d 510 (1965). This protection extends to intimate choices by unmarried as well as married persons. *Carey vs. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Eisenstadt vs. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L. Ed.2d 349 (1972).

It is not clear from the record that what occurs in the motel room is offensive to the governing majority. Traditionally, motels have been the location of "intimate relationships" by married persons or as unmarried persons, as well as married and unmarried persons of varying ages, races, colors, religious prefer-

ences, and including handicapped individuals. The well-recognized "quickie," the "nooner," the "one night stand" are traditional in America. The only difference between tradition and this Ordinance is that a day rate [over ten hours] or a full rate [at a non-defined adult motel] must be paid or the Petitioner's motels, and their patrons, subject themselves to the requirements of the Ordinance.

Since the Ordinance allows representatives of "the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises...at any time it is occupied..." (SECTION 41A-7. Inspection, Joint Appendix, pg. 21) it is not difficult to envision an American tradition eroding away because of the dissolving of a citizen's right to privacy.

This case not only deals with the individual's interest in protection from unwarranted public attention, comment, or exploitation; it deals, rather, with the individual's right to make certain unusually important decisions that will affect him or her individually. Certainly, the right to "intimate associations" for a limited period of time in a motel room should not be governed by an Ordinance that requires that the motel space be purchased for a minimum time period. The society that makes up the City of Dallas has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires and goals. The City of Dallas may prohibit an individual from imposing his will on another to satisfy his own selfish interest. The City of Dallas may also prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. The City of Dallas may explain the relative advantages and disadvantages of different forms of intimate expression. But when a City Ordinance attempts to conduct citizens' intimate relations by decreeing that they must rent a motel room for a set period of time, or that the motel owner must rent a motel room for a set period of time, it is a matter for the individuals, and the motel owner involved, not for the City of Dallas, to decide.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Judgment of the United States Court of Appeals for the Fifth Circuit be, in all respects, reversed.

Frank P. Hernandez
5999 Summerside, Suite 101
Dallas, Texas 75252
(214)931-9444
(Counsel of Record)